82-1784
NO.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1982

TROY STATE UNIVERSITY, The State of Alabama, and Its Board Of Trustees of Troy State University,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Should the Court resolve the conflict between the Eleventh Circuit Court of Appeals and all other circuit courts of appeals, as well as the conflict between the Eleventh Circuit Court of Appeals and the decisions of this Court as to the appropriate standard of review to be applied when a circuit court reviews a district court's dismissal of a plaintiff's action due to a plaintiff's failure to comply with discovery orders issued by a district court?

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Petitioners pray that a writ of certiorari issue to review the December 20, 1982, judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The United States Court of Appeals for the Eleventh Circuit in an opinion reported at 693 F.2d 1353 (11th Cir. 1982), reversed the July 20, 1981, order of the United States District Court for the Middle District of Alabama and remanded for a trial on the merits. The opinion of the circuit court is attached as Appendix i. The order of the district court is attached as Appendix ii.6.

JURISDICTION

Review is sought of the opinion of the United States Court of Appeals for the Eleventh Circuit issued on December 20, 1982, and reported at 693 F.2d 1353 (11th Cir. 1982). Troy State University's petition for rehearing and suggestion for rehearing en banc were denied in a per curiam decision issued on January 26, 1983.

The jurisdiction of this Court to review the opinion and judgment of the circuit court is invoked pursuant to 28 U.S.C. § 1254 (1).

FEDERAL RULES OF CIVIL PROCEDURE

This case involves Federal Rules of Civil Procedure 37(b)(2)(C) and 41 (b) which are set forth in Appendices iv. 1 and iv. 2 respectively.

STATEMENT OF THE CASE

1. The Course of Proceedings and Disposition of the Case

The underlying action was commenced on December 14, 1979, when respondent, Equal Employment Opportunity Commission, hereinafter EEOC, filed a complaint in the United States District Court for the Middle District of

Alabama alleging that petitioner, Troy State University, hereinafter Troy State, wilifully violated Sections 6 (d) (1) and 15 (a) (2) of the Fair labor Standard Act, 29 U.S.C. §§ 206 (d) (1) and 215 (a) (2), by discriminating against Troy State's female employees on the basis of their sex by paying employees of one sex lower wages than it paid employees of the opposite sex for equal work, the performance of which required equal skill, effort and responsibility. That action was presented to the district court pursuant to Section 17 of the Fair Labor Standards Act, 29 U.S.C. § 217.

Thereafter, the parties engaged in discovery in preparation for trial. The discovery process resulted in numerous motions by the parties and orders by the district court in connection with discovery disputes.

The district court, by order dated December 16, 1980, scheduled a trial of the cause for July 6, 1981. The parties then engaged in numerous discovery disputes based on EEOC's refusal to provide Troy State with access to certain documents and the opportunity to fully depose certain persons.[1]

On July 20, 1982, the district court entered an order dismissing EEOC's case based on its continuous, willful refusal to comply with the court's orders.

On September 15, 1981, EEOC filed its notice of appeal to the United States Court of Appeals for the Fifth Circuit.

On December 20, 1981, the decision of the Eleventh Circuit Court of Appeals panel assigned to this cause was issued. The panel concluded that "something short of dismissal was appropriate" and reversed the district court and remanded the matter.

Troy State subsequently filed both a petition for rehearing and a suggestion for rehearing en banc

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[1]The circuit court panel's chronological review of the relevant proceedings in this case provides background information for consideration herein. *See EEOC v. Troy State University*, 693 F.2d 1353 (11th Cir. 1982), attached as Appendix i.

which were denied in a per curiam decision issued on January 26, 1983.

2. The Underlying Facts[2]

The case involves two separate and distinct discovery disputes. The first dispute (the "Narrative Report Dispute") involves EEOC's refusal to produce documents that were part of the Department of Labor's investigative file. The second dispute (the "Confidential Informer Dispute") involves EEOC's refusal to allow Troy State University to question female faculty members concerning information the faculty members gave to the Department of Labor and EEOC's refusal to comply with the district court's eventual order that EEOC produce summaries of those interviews. The district court based its dismissal primarily on EEOC's refusal to produce the exhibits to the Narrative Report.

A. The Narrative Report Dispute

The Department of Labor investigator's narrative summary of findings, which she referred to as the Narrative Report, cites and refers to a number of exhibits. It is also apparent from reading the three page narrative that there are many exhibits to the Narrative Report that are not specifically mentioned within the narrative portion of that report. (R. 387-389)

At the May 5, 1981, deposition of EEOC Regional Attorney Jerome Rose, EEOC refused to produce the Narrative Report or any of its exhibits, claiming that the report was the work product of an attorney. (Rose Depo. 56-57) Thereafter, on May 12, 1981, Troy State filed a motion to compel seeking an order requiring EEOC "to produce the Narrative Report . . . and other documents requested from the investigative file other than statements

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[2]Citations to the record are as follows: R. = the designated record on appeal paginated 1 - 548 and consisting primarily of the pleadings; Tr. = transcript of the hearing held July 6, 1981 on defendant's motion to dismiss; Depo. = the deposition of the person identified in the citation.

and affidavits of confidential informants." (R. 286-288) On May 18, 1981, the court entered an order granting Troy State's motion to compel and ordering EEOC to produce "the 'Narrative Report' compiled by Ms. O'Grady, an employee of the Department of Labor." (R. 364-365) In response to that order, EEOC produced part of the three page summary, but failed to produce any of the exhibits to the Narrative Report. (R. 378-389)

Troy State then filed a renewed motion to compel which specifically requested that EEOC be required to produce "the *entire* narrative report including . . . all exhibits or attachments." (R. 402-403) The motion also listed the specific exhibits referred to in the Narrative Report and stated, "Defendant submits that these and any other exhibits or attachments should have been produced as well." (R. 402) In response to this renewed motion to compel, the court entered an order on June 8, 1981, one month prior to trial, ordering EEOC to show cause by June 19, 1981, why this case should not be dismissed based on EEOC's failure to comply with the court's earlier orders. (R. 425) EEOC then filed a response to the show cause order. That response presented various arguments relating to the Confidential Informer Dispute, but made no effort whatever to show cause why EEOC had not produced the exhibits to the Narrative Report. (R. 454-461)

Shortly thereafter, on June 26, 1981, the court held a telephonic conference between itself and the lawyers for all parties. (R 544-545) During that conference, the court directly and unequivocally ordered EEOC to produce all exhibits to the Narrative Report. (R. 544-545; Tr. 34-35) EEOC then produced some, but not all, of those exhibits.

At that point, Troy State filed a motion to dismiss EEOC's action based on EEOC's continued refusal to comply with the court's orders. (R. 504-510) In its motion, Troy State itemized eight separate categories of exhibits that EEOC had failed to produce. (R 507) EEOC then filed a responsive pleading in which it took the position that it had complied with the court's earlier orders by producing the exhibits that had been specifically mentioned or referred to in the

three page Narrative Report. EEOC did not, however, offer to produce the other exhibits to the Narrative Report. (R. 530-533)

The court scheduled a hearing for July 6, 1981, on the motion to dismiss. At that hearing, counsel for EEOC acknowledged that in its telephonic order of July 26, 1981, the court had specifically ordered EEOC to produce all exhibits to the Narrative Report. (Tr. 16) In response to a direct question from the court, counsel for EEOC conceded that EEOC had not produced all exhibits to the Narrative Report. (Tr. 16; 27-28) The court then confirmed most emphatically and most unequivocally that it had repeatedly ordered EEOC to produce all the exhibits. (Tr. 23-24; 31-35) The only excuse or justification offered by EEOC was that it was "confused" as to what was required of it. (Tr. 27-28) Even so, EEOC made no offer to produce the remaining documents. (Tr. 27-28) The court summarized its view of this sudden "confusion" as follows:

> It seems to me I have never had a case wherein one party was so reluctant at furnishing discovery as the EEOC has been in this case. The file will demonstrate repeated motions - when I have tried to make it as plain as I could what was expected of you and you just come back and file another motion. You have convinced me some time ago that you were simply trying to stretch this thing into the date of trial so that you couldn't furnish them any information that would be helpful to them.
>
> I will be frank with you: I have reached the point long ago of thinking that EEOC was not acting in good faith about this case. And why, I don't know. You are just another government employee. It is not your job to convict. It is your job to present facts. And these people are entitled to these facts so that they can study them, just as you are. This is government information and as such, belongs to all of us.

> I have tried to get you to give this information. I have given you an opportunity to seek a reversal of my order, and you have not done either of these things. You admit that there are some of these documents that you are still insisting are not available and . . . I am at my wit's end. I think the only thing to do is to dismiss this proceeding and I can't understand why you say it shouldn't be dismissed. (Tr. 23-24)

Based on these facts the court found that EEOC had willfully and contumaciously refused to comply with the court's orders and had left the court with no alternative to dismissal.

B. The Confidential Informer Dispute

Plaintiff sought a protective order which specifically would have prohibited defendant from inquiring as to whether certain deponents (female faculty members) had been contacted or interviewed by the Department of Labor or the EEOC and from inquiring into the substance of such contacts or interviews. (R. 342-345) On May 18, 1981, the district court denied EEOC's request for a protective order and granted Troy State's motion to overrule EEOC's objections. (R. 364-365) A second round of depositions for female faculty members was scheduled for May 22, 1981. (R. 366) At those depositions, a second Commission lawyer appeared and refused to allow Troy State to question the deponents as to the substance of any interviews they might have had with the Department of Labor or the EEOC. (R. 463-476)

On June 5, 1981, Troy State filed a renewed motion to overrule EEOC's objections. (R. 404-407) The court entered an order directing EEOC to show cause why the case should not be dismissed based on EEOC's refusal to allow this inquiry. (R. 425) EEOC responded by asserting that Troy State could not inquire into the substance of the interviews between the deponents and the Department of Labor because to do so might result in disclosing the identity of confidential informers. (R. 454-461) On June 26,

1981, shortly after EEOC filed it's response, the court held a telephonic conference with counsel for all parties. During that conference, the court ruled that the deponents were not confidential informers and that EEOC could not prohibit Troy State from asking the deponents to give Troy State the same information they had given the Department of Labor or the EEOC. (Tr. 4-6) The court noted, however, that its ruling in this regard was an empty victory for Troy State since the trial was scheduled for only a few days later and Troy State would not have time to redepose these persons. (Tr. 4-6) Therefore, the court ordered EEOC to produce the interview summaries prepared by a Department of Labor Compliance Officer based on her notes. (Tr. 4-6; 16; 23)

However, EEOC continued to refuse to give Troy State copies of the prepared interview summaries. Based partially on that refusal, Troy State filed its motion to dismiss. (R. 504-509) EEOC responded by asserting that the faculty members were confidential informers and that to reveal the summaries would subject them to retaliation by Troy State. (Tr. 530-533) The court scheduled a hearing for July 6, 1981, on Troy State's motion to dismiss, and at that hearing EEOC continued to resist production of the subject statements based on its assertion of informer's privilege. The district court was of the opinion that no such privilege protected the statements in question and, based in part on EEOC's continued refusal to produce the statements, eventually dismissed the case. (R. 544-545)

EEOC appealed the district court's order dismissing the case. The circuit court panel's decision includes a chronological review of the proceedings of the case. 693 F.2d 1353, 1355-1356. The circuit court panel concluded that the district court, "never issued a specific written order delineating precisely what EEOC needed to provide in order to forestall dismissal. Such an order followed by a refusal to comply might have properly set the stage for dismissal." 693 F.2d 1353, 1357.

The circuit court panel concluded its decision with the holding that, "something short of dismissal was appro-

priate." 693 F.2d 1353, 1358. Thus the district court's decision was reversed and remanded. Troy State's subsequent petition for rehearing and suggestion for rehearing en banc were denied.

ARGUMENT AND AUTHORITIES

The circuit court neither explicitly nor implicitly held that the district court abused its discretion by dismissing EEOC's complaint. In fact, the circuit court simply analyzed the evidence as it appeared in the record on appeal and concluded that the appropriate remedy for EEOC's misconduct was something less drastic than dismissal of the complaint. That method of analysis and decision making conflicts with the appellate standard of review established by the Supreme Court in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), and followed by all other circuit courts of appeals.

Even though the circuit court implied that it would have issued a written order delineating the documents to be provided by EEOC in order to forestall dismissal, the fact that the district court as trier of fact followed an alternative course of action provides no basis for reversal of the dismissal order. Likewise, the circuit court's reversal of the district court's order is not justified either because the circuit court would have given greater consideration to the alternatives to dismissal suggested by EEOC or because the circuit court would have exacted a less drastic sanction than that considered appropriate by the district court.

The appropriate standard for review in any case which involves a district court order of dismissal based on failure of a party to obey a court discovery order is the abuse of discretion standard applied in *National Hockey League*.

The Supreme Court made it clear in *National Hockey League*, that the circuit court is not to place itself in the shoes of the district court and decide how *it* would have dealt with a party's misconduct. The responsibility and burden for such decisions rests with the district court. The

review of the circuit court decision is limited to a determination as to whether the district court abused its discretion. In *National Hockey League*, the circuit court reversed the district court's dismissal of the plaintiff's antitrust action due to the plaintiff's failure to answer interrogatories. In reversing the circuit court, the Supreme Court established the following standard:

> The question, of course, is not whether this Court, or whether the court of appeals, would as an original matter have dismissed the action; it is whether the district court abused its discretion in so doing. e.g., *C. Wright & A. Miller,* Federal Practice and Procedure: Civil § 2284, p. 765 (1970); *General Dynamics Corp. v. Self Mfg. Co.,* 481 F.2d 1204, 1211 (CA 8, 1973); *Baker v. F & V Investment,* 470 F.2d 778, 781 (CA 2 1972).

427 U.S. 639, 642.

The standard applied in this case by the Eleventh Circuit Court of Appeals is inconsistent with the *National Hockey League* decision and decisions in every other circuit.

In *Corchado v. Puerto Rico Marine Management, Inc.,* 665 F.2d 410 (1st Cir. 1981), *cert. denied,* 103 S.Ct. 60 (1982), the first circuit upheld the district court's dismissal based on the plaintiff's failure to comply with discovery orders and the failure of plaintiff's counsel to attend a pretrial conference. In so holding, the circuit court restated the elements of the applicable standard of review:

> The conduct of the plaintiff's attorneys in this case brings it within the ambit of both Federal Rule of Civil Procedure 37(b) (2) (C) (dismissal for failure to respond to discovery) and Federal Rule of Civil Procedure 41 (b) (dismissal for failure to prosecute). The standard of review is the same for both, abuse of discretion.

665 F.2d 410, 413

In *Penthouse International, Ltd. v. Playboy Enterprises, Inc.*, 663 F.2d 371 (2d Cir. 1981), after the district court dismissed the plaintiff's suit because the plaintiff refused to produce certain financial records pursuant to a court order, the circuit court relied upon *National Hockey League* and held that the district judge did not abuse his discretion in dismissing the action.

In refusing to reconsider the district court's order dismissing the plaintiff's complaint with prejudice as a sanction for failure to provide discovery, the circuit court in *Quality Prefabrication v. Daniel J. Keating Co.*, 675 F.2d 77 (3d Cir. 1982), applied the abuse of discretion standard in reliance on *National Hockey League.*

In *Roman v. ESB, Inc.*, 550 F.2d 1343 (4th Cir. 1976), the Fourth Circuit Court of Appeals held that plaintiffs, who failed to respond to a set of interrogatories and a subsequent order requiring a response and who then failed to respond to specific requests after the district court had denied an additional motion to dismiss, were properly dismissed as a result of the defendant's subsequent motion to dismiss. The circuit court applied the abuse of discretion standard and held that, "[t]he court acted within options available to it under FRCP 37(d), and we are of the opinion there was no abuse of discretion. *Moore v. Island Creek Coal Co.*, 375 F.2d 732 (4th Cir. 1967); 4A Moore's Federal Practice, §37.05 2d Ed. 1974." 550 F.2d 1343, 1349.

The eleventh circuit's decision in this case deviates from fifth circuit precedent even though fifth circuit cases handed down prior to September 30, 1981, are binding precedent in the eleventh circuit. *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981) (en banc). The standard applied by the fifth circuit is exemplified by the decision in *Sig M. Glukstad v. Lineas Aereas Nacional - Chile,* 656 F.2d 976 (5th Cir. 1981). In that case, the plaintiff's complaint was dismissed by the district court for failure of the plaintiff to comply with a discovery order to reveal the identity of its undisclosed principal. In affirming the district court's dismissal, the circuit court held that, "[i]n reviewing a district court's dismissal sanction under Fed. R. Civ. P. 37 (b)

the standard is whether the lower court abused its discretion in dismissing the action. *National Hockey League v. Metropolitan Hockey Club, Inc.*, ... " 656 F.2d 976, 978 (other citations and footnote omitted).

The abuse of discretion standard has long been applied in the Sixth Circuit Court of Appeals. In *Mooney v. Central Motor Lines*, 222 F.2d 569 (6th Cir. 1955), the district court dismissed the plaintiff's action after the plaintiff failed to appear for the taking of a deposition and failed to appear for a physical examination. In holding that the district court did not abuse its discretion in denying the plaintiff's motion to amend the district court's judgment to provide for dismissal without prejudice, the circuit court concluded that, "[t]here was no showing of abuse of discretion on the part of the district court in denying appellant's motion to amend the judgment to provide for a dismissal without prejudice." 222 F.2d 569, 572.

More recently, when holding that a district court did not abuse its discretion in refusing to permit a party to have a witness testify when that witness' name was not furnished to the opposing party until three days prior to trial, the sixth circuit held that, "[a] trial court has broad discretion in its choice of sanctions for failure to comply with discovery orders and, in appropriate circumstances, it may even dismiss the case. We hold that the trial court properly exercised its discretion here." *Davis v. Marathon Oil Company*, 528 F.2d 395 (6th Cir. 1975), *cert. denied*, 429 U.S. 823 (1976).

In holding that the trial court did not abuse its discretion by dismissing the plaintiff's suit for failure to comply with discovery orders where the plaintiff was evasive and resistant to discovery, the Seventh Circuit Court of Appeals relied on *National Hockey League*. It held that, "[t]he *National Hockey League* Court reminds us that in reviewing this issue, the question is not whether we would have chosen to dismiss this suit, but whether the district court abused its discretion in so doing." *Loctite Corporation v. Fel-Pro, Inc.*, 667 F.2d 577, 583 (7th Cir. 1981) (citation omitted).

In *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir. 1981), *cert. denied*, 454 U.S. 968 (1981), the circuit court relied on *National Hockey League* when it held that the district court did not abuse its discretion in striking defendant's affirmative defenses in counterclaims as a sanction for wiliful, bad faith failure to comply with discovery orders in a timely manner. In so holding, the court stated that, "[t]he issue before this court is not whether we would, as an original matter, have imposed the sanctions, but rather, whether the district court abused its discretion in doing so." 653 F.2d 1208, 1213 (citations omitted).

In *Visioneering Construction v. United States Fidelity & Guaranty*, 661 F.2d 119 (9th Cir. 1981), the circuit court held that one party's refusal to facilitate discovery and continued failure to respect discovery orders justified the district court's entry of a defualt judgment. The circuit court relied on *National Hockey League* when it held that:

> The imposition of Fed. R. Civ. P. 37 sanctions was thus allowable and should not be reversed unless there has been an abuse of discretion. *National Hockey League v. Metropolitan Hockey Club, Inc.*, ... "The question, of course, is not whether this Court, or whether the [District Court], would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing." *Id. See also Denton v. Mr. Swiss of Missouri, Inc.*, 564 F.2d 236, 239 (8th Cir. 1977); *Pioche Mines Consolidated, Inc. v. Dolman*, 333 F.2d 257, 269 (9th Cir. 1964).

661 F.2d 119, 123.

In *Barta v. Long*, 670 F.2d 907 (10th Cir. 1982), the circuit court upheld the district court's default judgment based on the defendants' failure to answer interrogatories. The circuit court held that it would "not upset the decision of the trial court (not to set aside the default judgment) unless an abuse of discretion is demonstrated." 670 F2d 907, 910.

In *Dellums v. Powell*, 566 F.2d 231 (D.C. Cir. 1977), the circuit court applied the abuse of discretion standard from *National Hockey League* when it reviewed the propriety of the district court's modification of an order of dismissal which was based on a defendant's failure to respond to interrogatories. The circuit court specifically held that the issue on review was not what the circuit court would do in the first instance, but whether the trial judge had abused his discretion.

Thus, the Eleventh Circuit Court of Appeals stands alone in its failure to apply the abuse of discretion standard of *National Hockey League*.

It was inappropriate for the circuit panel to base its decision on the subsequent willingness of EEOC to provide the documents which it had refused to produce prior to dismissal. The sanctions under Federal Rules of Civil Procedure 37 (b) (2) (C) and 41 (b) exist in part to insure that parties will comply with district court orders without the necessity of further direct court involvement and in part to insure that parties to other lawsuits will be deterred from ignoring the orders of district courts. That EEOC has "learned its lesson" and will now comply is not justification for reversal of the district court's order. In *National Hockey League*, the Supreme Court admonished circuit courts of appeals concerning the exercise of undue leniency in such cases by holding:

> There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the district court.
>
> But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by

> statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the court of appeals remained undisturbed in this case, it might well be that these respondents would faithfully comply with all future discovery orders entered by the district court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts.

427 U.S. 639, 642-643.

Whether further leniency by the district court may have resulted in reformation of and compliance by EEOC is not relevant. The district court exercised its discretion in dismissing the action only after EEOC repeatedly and flagrantly disregarded the court's order.

The order to dismiss was based on the court's finding of EEOC's "continuous, willful refusal to conform to the normal rules of discovery and the total disregard of the orders of [the] Court," and was without prejudice to the rights of individual faculty members.

The district court's dismissal was consistent with *National Hockey League* and the fifth circuit's holding that dismissal is warranted "where a clear record of delay or contumacious conduct by the plaintiff exists." *Gonzales v. Firestone Tire & Rubber Co.*, 610 F.2d 241 (5th Cir. 1980).

The district court concluded, based on its first hand knowledge of the proceedings, that EEOC's failure to comply with its orders was the result of EEOC's "continuous, willful refusal . . . . and total disregard of the orders of [the] Court." The facts certainly support that conclusion. The circuit panel's substitution of its judgment is clearly unjustified by either the facts, or the precedent established by the circuit courts and the Supreme Court.

CONCLUSION

Inasmuch as in both the Narrative Report Dispute and the Confidential Informer Dispute EEOC's conduct amounts to a "clear record of delay and contumacious conduct" as found by the district court, it is clear that the district court did not abuse its discretion in dismissing EEOC's suit.

Furthermore, the circuit panel's substitution of its judgment for that of the district court, absent the finding or existence of any abuse of discretion by the district court, establishes a standard for review of district court decisions for the Eleventh Circuit Court of Appeals which is in direct conflict with the standard of review announced by the Supreme Court and applied by all other circuits. Thus, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix i

EEOC V. Troy State University, 693 F.2d 1353 (11th Cir. 1982).

20

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

TROY STATE UNIVERSITY, The State of Alabama, and its Board of Trustees of Troy State University, Defendants-Appellees.

No. 81-7751

United States Court of Appeals,
Eleventh Circuit.

Dec. 20, 1982

Appeal from the United States District Court for the Middle District of Alabama.

Before RONEY and CLARK, Circuit Judges, and TUTTLE, Senior Circuit Judge.

RONEY, Circuit Judge:

This is an appeal from the district court's dismissal of a sex-based wage discrimination suit brought by the Equal Employment Opportunity Commission in a representative capacity on the ground that EEOC failed to comply with discovery orders. We reverse the dismissal and remand for a trial on the merits because it appears from the record that EEOC's noncompliance stemmed from confusion and a misunderstanding of the court's order, not from bad faith or callous disregard of the order. Further, noncompliance did not substantially prejudice the employer. An equally effective remedy, with a less drastic effect on the persons for whom EEOC sued, should have been considered and fashioned by the court.

While a district court has broad powers under Rule 37, Fed.R.Civ.P., to impose sanctions for a party's failure to abide by discovery orders, dismissal of a plaintiff's case with prejudice is "a sanction of last resort, applicable only in extreme circumstances." *EEOC v. First National Bank,*

614 F.2d 1004, 1007 (5th Cir. 1980), *cert. denied,* 450 U.S. 917, 101 S.Ct. 1361, 67 L.Ed.2d 342 (1981); *Emerick v. Fenick Industries, Inc.,* 539 F.2d 1379, 1381 (5th Cir. 1976); *Thomas v. United States,* 531 F.2d 746, 749 (5th Cir.1976). *See Bon Air Hotel, Inc. v. Time, Inc.,* 376 F.2d 118, 121 (5th Cir. 1967), *leave to file petition for cert. denied,* 393 U.S. 815, 89 S.Ct. 225, 21 L.Ed.2d 17 (1968). Dismissal is generally proper only if the plaintiff acted willfully. *See Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers,* 357 U.S. 197, 212, 78 S.Ct. 1087, 1095, 2 L.Ed.2d 1255 (1958); *Strain v. Turner (In re Liquid Carbonic Truck Drivers Chemical Poisoning Litigation,* 580 F.2d 819, 822 (5th Cir.1978), *cert. denied,* 441 U.S. 945, 99 S.Ct. 2165, 60 L.Ed.2d 1047 (1979). *Cf. National Hockey League v. Metropolitan Hockey Club, Inc.,* 427 U.S. 639, 643, 96 S.Ct. 2778, 2781, 49 L.Ed.2d 747 (1976) (dismissal affirmed but court emphasized "respondents' 'flagrant bad faith' and their counsel's 'callous disregard' of their responsibilities"). The hesitancy to dismiss a suit is especially appropriate when a dismissal could impede employees within the scope of the Commission's action from receiving redress for their employer's Equal Pay Act violations.

A chronological review of the relevant proceedings is helpful in understanding our disposition of this case. EEOC brought this action pursuant to section 17, Fair Labor Standards Act, 29 U.S.C.A. § 217, on behalf of the female faculty at Troy State University. The Department of Labor conducted the initial administrative investigation of Troy State's pay practices. The enforcement responsibilities under the Equal Pay Act were transferred to EEOC. The investigative file included the department investigator's three page summary of findings, referred to as the "Narrative Report." One section of that report labeled "Complaint Data" contained the name of a complaining employee and the substance of her complaint. The investigative file also contained a number of exhibits, some of which were referred to in the summary. Among the exhibits were records of statements furnished by Troy State employees regarding the University's pay practices.

On May 4, 1981, the district court issued a protective order exempting the Commission from disclosing documents identifying persons who talked with or were interviewed by the Department of Labor or EEOC.

On *May 12*, Troy State moved to compel Commission production of the investigator's Narrative Report, a memorandum written by EEOC attorneys concerning this action, and "any other documents included within the investigative file which documents are not covered by the Court's protective order of May 4, 1981." At the same time, the Commission moved for a protective order to limit Troy State's questioning of deponents, arguing that "defendants are trying to obtain, through individual deponents, the very same information that has already been placed under a protective order."

On *May 18*, the district court granted Troy State's motion to compel discovery, ordered EEOC to produce the Narrative Report, granted Troy State's motion to overrule EEOC's deposition objection and denied the Commission's motion for a protective order, ruling that Troy State could inquire into whether deponents were contacted or interviewed by EEOC or the Department of Labor.

The Commisison supplied Troy State with the Narrative Report but did not produce any exhibits in the investigative file and deleted the portion of the report that identified the complaining party. EEOC reasoned that the May 4 order protected the deleted information from disclosure.

On *June 4*, Troy State filed a motion to compel production of an unexcised copy of the Narrative Report and all exhibits or attachments.

On *June 8*, one month prior to trial, the district court issued an order to show cause on or before June 19 why EEOC's action should not be dismissed for failure to follow the court's discovery orders. In response to the court order to show cause, EEOC stated that it did not believe the May 18 order allowed Troy State to inquire without restriction into either the identity of complainants or the substance of the Government's discussions with Troy State employees.

On *June 26,* the district court held a telephone conference with counsel for the parties. During this conference, the court stated that in its opinion EEOC could not prevent Troy State from obtaining the information faculty members had provided EEOC since this information constituted the very evidence Troy State had to defend against. The court again ordered the production of the entire Narrative Report, including all exhibits as well as any statements made during the investigation. Although the Commission provided all interview statements, it produced only those exhibits from the investigative file that were specifically referred to in the report.

On *June 30,* Troy State moved to dismiss the action on the ground that EEOC had not complied with the court's oral order in that it (1) had excised the portion of the Narrative Report identifying the complainant and (2) had supplied only exhibits referred to in the Narrative Report. On the same day, EEOC supplied the court with the name of the complaining witness. It responded to Troy State's motion by indicating that it had complied with the court's earlier orders by supplying the exhibits specifically referred to in the Narrative Report and exhibits connected with the directive to produce interview statements. EEOC stated that it did not understand the court's oral order to require production of all exhibits in the investigative file.

On *July 6,* the court held a hearing on the motion to dismiss. When the court determined that all the exhibits in the investigative file had not been furnished, it stated that it intended to dismiss EEOC's suit.

On *July 10,* EEOC, at the court's request, filed a memorandum setting forth its view of the effect of a dismissal on the individuals allegedly discriminated against.

On *July 20,* the court entered an order dismissing the Commission's case "without prejudice to the rights of the individual faculty members" based on the court's finding that the continuous, willful refusal to comply with its orders left no alternative to dismissal.

EEOC asserts on appeal that dismissal of the Equal Pay action left aggrieved employees of Troy State with no remedy for their employer's sex-based wage discrimination. It argues that the severe sanction of dismissal was unjustified for three reasons. First, it asserts that the information provided by Troy State employees to the Government was privileged. Second, EEOC claims to have tried in good faith to comply with a confusing oral order as it understood it. Third, the Commission argues Troy State suffered no prejudice from its lack of access to the exhibits that EEOC did not produce.

We need not decide whether EEOC could be required to furnish what it characterizes as privileged information.[1] Nor do we have to decide precisely what effect the dismissal has on the rights of the individuals.[2] EEOC has represented on appeal both before and at oral argument that it is now willing to give Troy State without objection all material that has been requested to date. Troy State argues

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1. *Wirtz v. Continental Finance & Loan Co. of West End*, 326 F.2d 561 (5th Cir. 1964), recognizes a privilege embracing employees and statements made to the Department of Labor during its investigations of Fair Labor Standards Act violations.

2. The Commission argues:

Section 16(b) of the FLSA provides individual employees with a private right of action to redress violations of the Act. 29 U.S.C. § 216(b). However, the same section explicitly states "the right provided by this subsection to bring an action . . . *shall terminate upon the filing of a complaint by the Secretary of labor in an action under Section 17* in which (1) restraint is sought of any further delay in the payment of . . . wages . . . owing to such employee under section 6 . . . of this Act." See S.Rep. No. 145, 87th Cong., 1st Sess., reprinted in [1961] U.S. Code Cong. & Ad.News 1620, 1658—59 ("[The f]iling of a complaint by the Secretary pursuant to the new authority given him to initiate such injunction suits without formal requests from employees, the right of individuals to later file suit for compensation and liquidated damages under 16(b)."); Conf.Rep. No. 327 87th Cong., 1st Sess., reprinted in [1961] U.S. Code Cong. & AdNews 1706, 1713. The Fifth Circuit has recently considered and analyzed this statutory language in *Donovan v. University of Texas at El Paso*, 643 F.2d 1201, 1207 (5th Cir.1981) where it concluded that "the claims of *all* employees who had not already initiated private actions are

that the record of the July 6 hearing demonstrates EEOC was not then willing to give all material the court had ordered. We have read the record and are not so sure. EEOC argues that it had "caved" on its argument of privilege. What each party was trying to say may have differed from what was understood. In any event, the court never issued a specific written order delineating precisely what EEOC needed to provide in order to forestall dismissal. Such an order followed by a refusal to comply might have properly set the stage for dismissal.

The primary dispute revolved around EEOC's unwillingness to disclose the identity of the complaining party, her complaint, and statements made by Troy State employees to the Department of Labor. As EEOC admits, by the time of the July 6 hearing on Troy State's motion to dismiss, the Commission had been compelled by the June 26 oral order to hand over at least some documents from the investigative file that it claimed were privileged. On June 26, the day the court issued its oral order, the Commission delivered all exhibits specifically referred to in the Narrative Report. At the July 6 hearing, counsel for the Commission

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consolidated at the time of the filing of the Secretary's suit" and thus "[t]he right of an affected employee to *commence* or become a party plaintiff in a private action terminates"; emphasis in original. See also *Wirtz v. Malthor,* 391 F.2d 1, 3 (9th Cir. 1968) ("[T]he amendment made . . . in 1961 withdraws an employee's right to sue for the unpaid wages and overtime compensation due him under the FLSA if the Secretary files an action against the employer . . . .").

Therefore, since a governmental action has been filed by the Commission under section 17 seeking vindication of the equal pay claims of Troy State faculty members, the statute expressly "withdraws" *(Wirtz v. Malthor, supra)* their right to bring a section 16(b) action covering those same claims. Since the statute withdraws the right to sue itself, the rights of faculty members on whose behalf the suit was brought are extinguished without regard to the normal rules of res judicata.

Troy State argues, however, that *Truvillion v. King's Daughters Hosp.,* 614 F.2d 520 (5th Cir. 1980), and *Jones v. Bell Helicopter Co.,* 614 F.2d 1389 (5th Cir.1980), establish that an employee retains the right to bring an independent action if the dismissal of EEOC's suit is not "on the merits" within the meaning of Fed.R.Civ.P. 41(b).

explained that he believed EEOC had complied with the June 26 order and that the Commission had not understood the order to require production of all exhibits in its investigative file.

The Commission's interpretation of the June 26 order does not seem to have been wholly unreasonable. In its opinion dismissing the suit, the district court stated that its oral order required "production of the entire 'Narrative Report,' including all exhibits . . . ." In its motion seeking dismissal, Troy State had described the June 26 order as requiring production of the Narrative Report "including all exhibits *thereto*" (emphasis supplied). If these descriptions of the order are accurate, then EEOC justifiably could have believed it had to produce only the exhibits mentioned in the report.

EEOC's confusion concerning other court orders provides a feasible explanation for its failure to produce the exhibits earlier in the litigation. Prior to the June 26 order, the Commission apparently believed that the May 4 protective order, which exempted disclosure of documents identifying informers, protected much of the material contained in exhibits in the investigative file. Further, the district court's May 18 order compelling discover did not expressly require the production of exhibits in the investigative file. The May 18 order compelled EEOC to produce the Narrative Report, but otherwise denied Troy State's motion to compel, including its demand for all other documents within the file not covered by the May 4 protective order.

Once the Commission fully understood that the court expected it to produce all exhibits in the file, it indicated it was willing to comply. Although EEOC's position at the July 6 hearing was somewhat unclear, it confirmed in a subsequent memorandum to the district court prior to the entry of the dismissal order that it stood ready to provide the remaining undisclosed exhibits.

The Commission's actions do not appear to constitute

willful misconduct justifying the "use of the Draconian remedy of dismissal." *Marshall v. Segona*, 621 F.2d 763, 767 (5th Cir.1980). A party's simple negligence or other action grounded in a misunderstanding of a court order does not warrant dismissal. *Id.* at 768. The contrast between EEOC's actions in this case and counsel's actions in a case decided this day in which we affirm a district court's sanction of pleading dismissal is apparent from a review of that case. *State Exchange Bank v. Hartline*, Slip op. p. 863, — F.2d — (11th Cir.1982). Further, the Government initially procured most of the information Troy State wanted from Troy State itself. It is significant, though not controlling, that Troy State was not prejudiced by any "lack of access" to information. *Marshall v. Segona*, 621 F.2d at 768.

Dismissal is generally proper only where less drastic sanctions cannot substantially accomplish its purpose. *Id. See Aztec Steel Co., A.F.S.C.O. v. Florida Steel Corp.*, 691 F.2d 480, 481-82 (11th Cir. 1982). EEOC in its July 10 memorandum on the effect of dismissal on the individual rights of Troy State employees suggested alternatives which could have alleviated all prejudice, if any existed, to Troy State from the Commission's failure to produce the exhibits. The Commission specifically suggested that the case be allowed to proceed to trial and Troy State be given access to all exhibits and data in the Department of Labor's investigative file. In the alternative EEOC's suggested that if prejudice to Troy State could be shown, the court could limit production of EEOC's evidence accordingly. The record does not disclose that the court considered either these or other available sanctions and decided they would not be effective. We do not suggest which, if either, of these alternatives should have been adopted. We merely conclude that something short of dismissal was appropriate.

Because the Commission probably could have avoided dismissal and thereby eliminated the need for appeal by making clear at the hearing its willingness to produce all the exhibits, each party shall bear its own costs on appeal.

REVERSED AND REMANDED.

Appendix ii

1. United States District Court order of May 4, 1981, granting in part and denying in part plaintiff's motion for protective order filed April 30, 1981.

2. United States District Court order of May 18, 1981, granting in part and denying in part, plaintiff's motion to compel filed May 12, 1981; granting defendant's motion for an order overruling objections filed May 12, 1981; denying defendant's request for sanctions contained in defendant's motion filed May 12, 1981; denying plaintiff's motion for a protective order filed May 13, 1981; extending the date for discovery until June 8, 1981.

3. United States District Court order of June 8, 1981, ordering the plaintiff to show cause why the proceeding should not be dismissed for failure to abide by the orders of the court.

4. United States District Court order of June 8, 1981, ordering plaintiff to produce and deliver a copy of "Equal Pay Compliance Memorandum for Colleges and Universities."

5. United States District Court opinion of July 20, 1981, granting defendant's motion to dismiss filed on June 30, 1981.

6. United States District Court order of July 20, 1981, granting defendant's motion to dismiss filed June 30, 1981.

ii.1

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION	)	
Plaintiff,	)	
VS.	)	CIVIL ACTION NO. 79-611-N
TROY STATE UNIVERSITY; ET AL.	)	
Defendants.	)	

ORDER

Upon consideration of the Plaintiff's motion for protective order filed herein April 30, 1981, it is

ORDERED by this Court that said motion be, and the same is hereby, granted as to Paragraphs 1 and 2. Said motion is denied in all other respects.

DONE this 4th day of May, 1981.

UNITED STATES DISTRICT JUDGE

ii.2

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISISON	)	
Plaintiff,	)	
VS.	)	CIVIL ACTION NO. 79-611-N
TROY STATE UNIVERSITY; ET AL.	)	
Defendants.	)	

ORDER

Upon consideration of Defendants' motion to compel filed herein May 12, 1981, it is

ORDERED by this Court that, on or before May 26, 1981, the Plaintiff produce for the Defendants the "Narrative Report" compiled by Mrs. O'Grady, an employee of the Department of Labor. Said motion is denied in all other respects.

Upon consideration of Defendants' motion filed herein May 12, 1981, for an Order Overruling Objections, it is further

ORDERED by this Court that said objections by the Plaintiff are hereby overruled, and the Defendants may inquire of deponents whether they were contacted or interviewed by the Plaintiff or by the Department of Labor. It is further

ORDERED by this Court that Defendants' request for sanctions - contained in their motion filed herein May 12, 1981, for an order overruling objection - be, and the same is hereby, denied as premature under Rule 37, Federal Rules of Civil Procedure. It is further

ORDERED by this Court that Plaintiff's motion for a protective order filed herein May 13, 1981, is denied in that Defendants may inquire into whether deponents were contacted or interviewed by the Plaintiff or by the Department of Labor.

In addition, there is a joint motion for extension of time filed herein May 14, 1981, requesting an extension on the pretrial cut-off dates for discovery and the dates for exchange of exhibits and witness lists. These time limitations are imposed by the Court for the convenience of the parties and may be extended by joint agreement of the parties. Accordingly, it is

ORDERED by this Court that the date for discovery, exchange of exhibits and witness lists be, and the same is hereby, extended to June 8, 1981.

DONE this 18th day of May, 1981.

_____

UNITED STATES DISTRICT JUDGE

ii.3

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION	)	
Plaintiff,	)	
VS.	)	CIVIL ACTION NO. 79-611-N
TROY STATE UNIVERSITY; ET AL,	)	
Defendants.	)	

ORDER TO SHOW CAUSE

Upon consideration of the Defendants' renewed motions to compel and to overrule with requests for sanctions filed herein June 5, 1981, it is

ORDERED by this Court that, on or before June 19, 1981, the Plaintiff show cause, if any it has, why this proceeding should not be dismissed for failure to abide by the Orders of this Court and why the extra cost of obtaining the requested discovery should not be taxed against the Plaintiff and its attorneys pursuant to Rule 37(b), Federal Rules of Civil Procedure.

DONE this 8th day of June, 1981.

UNITED STATES DISTRICT JUDGE

ii.4

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION	)	
Plaintiff,	)	
VS.	)	CIVIL ACTION NO. 79-611-N
TROY STATE UNIVERSITY; ET AL,	)	
Defendants.	)	

ORDER

Upon consideration of the Defendants' motion to compel filed herein June 5, 1981, it is

ORDERED by this Court that, on or before June 15, 1981, the Plaintiff produce and deliver to the Defendants a complete copy of "Equal Pay Compliance Memorandum for Colleges and Universities".

Plaintiff has sought to invoke an informer's privilege similar to that found in criminal law and has sought to maintain secrecy of its files comparable to that provided in criminal law. This Court is not aware of any such right, the civil rules of discovery being extremely broad.

DONE this 8th day of June, 1981.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

EQUAL OPPORTUNITY OPPORTUNITY COMMISSION	)	
PLAINTIFF,	)	
VS.	)	CIVIL ACTION NO. 79-611-N
TROY STATE UNIVERSITY; ET AL,	)	
Defendants.	)	

OPINION

Having come on for a hearing on July 6, 1981, this cause is now submitted to the Court on Defendants' motion to dismiss filed herein June 30, 1981. This action was brought by the Plaintiff, Equal Employment Opportunity Commission, on behalf of the female members of the Troy State Faculty for alleged violation by Defendants of the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.*

On May 18, 1981, this Court ordered the Plaintiff to produce pursuant to Defendants' motion to compel filed herein May 12, 1981, certain material described as the "Narrative Report". On May 26, 1981, the Plaintiff produced an excised copy of the text of the report but failed to produce any of the exhibits that are regularly and customarily attached and referred to in the report. Defendants then filed a renewed motion to compel production of the entire report, including all exhibits thereto. On June 8, 1981, this Court entered a Show Cause Order to the Plaintiff directing it to show cause why this case should not be dismissed based on Plaintiff's failure to comply with the previous Order of this Court. Plaintiff's response was that it was confused and that the compelled materials were protected. At the same time, a number of motions and objections were filed with the Court concern-

ing questions Defendants could ask witnesses in deposition. The record shows Plaintiff's disregard of the Orders of this Court by Plaintiff's persistent blocking of witnesses' responses.

Finally, a week before this cause was scheduled to go to trial (estimated duration, 1 month), a telephone conference was conducted by this Court with counsel for the parties. During said conference, the Court again stated that in its opinion the Plaintiff could not prevent the Defendants from inquiring as to information, facts or evidence certain faculty members had provided Plaintiff since such information formed the very evidence the Defendants would have to defend against. The Court then ordered once again the production of the entire "Narrative Report", including all exhibits as well as any statements of interviews taken by the Department of Labor during its investigation. Counsel for the Plaintiff assured the Court they would turn over all such material within the next several days. As shown at the hearing of this cause one week later, said Order was not complied with.

Therefore, as a result of the continuous, willful refusal to conform to the normal rules of discovery and the total disregard of the Orders of this Court, this Court is of the opinion that Defendants' motion to dismiss should be granted without prejudice to the rights of the individual faculty members. Rule 37(d), Federal Rules of Civil Procedure.[1]

An Order will be entered in accordance with this Opinion.

DONE this 20th day of July, 1981.

UNITED STATES DISTRICT JUDGE

[1]This Court has considered the briefs concerning the effect of said dismissal on the rights of individual faculty members to bring an individual action. It is difficult to believe that Plaintiff has been totally candid in its evaluation of such effect when it has failed to point out two significant recent cases decided by the United States Court of Appeals for the Fifth Circuit. *Baker v. King's Daughters Hospital*, 614 F.2d 520 (5th Cir. 1980); *Jones v. Bell Helicopter Co.*, 614 F.2d 1389 (5th Cir. 1980). Such action exemplifies the Plaintiff's apparent attitude toward the Court.

ii.6

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
VS.	)	CIVIL ACTION NO. 79-611-N
TROY STATE UNIVERSITY; ET AL.	)	
Defendants.	)	

ORDER

In accordance with the Opinion entered in the above-styled cause on this date, it is

ORDERED by this Court that the Defendants' motion to dismiss filed herein June 30, 1981, be, and the same is hereby, granted, and the above-styled cause is hereby dismissed without prejudice to the rights of the individual faculty members.

DONE this 20th day of July, 1981.

UNITED STATES DISTRICT JUDGE

Appendix iii

United States Court of Appeals for the Eleventh Circuit judgment of December 20, 1982, reversing the order of the district court appealed from, and remanding to the district court.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 81-7751

D.C. Docket No. 79-611-N

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

versus

TROY STATE UNIVERSITY, THE STATE OF ALABAMA, and ITS BOARD OF TRUSTEES OF TROY STATE UNIVERSITY

Defendants - Appellees.

Appeal from the United States District Court for the Middle District of Alabama

Before RONEY and CLARK, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, REVERSED; and that this cause be, and the same is hereby, REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that each party bear their own costs on appeal to be taxed by the Clerk of this Court.

December 20, 1982

ISSUED AS MANDATE:

Appendix iv

1. Rule 37(b) (2) (C), Federal Rules of Civil Procedure
2. Rule 41(b), Federal Rules of Civil Procedure

iv.1

Federal Rules of Civil Procedure
Rule 37
Failure to Make or Cooperate in Discovery:
Sanctions

* * *

(b) FAILURE TO COMPLY WITH ORDER

(1) SANCTIONS BY COURT IN DISTRICT WHERE DEPOSITION IS TAKEN. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) SANCTIONS BY COURT IN WHICH ACTION IS PENDING. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts

thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey an order except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

* * *

iv.2

Federal Rules of Civil Procedure
Rule 41(b)
Dismissal of Actions

* * *

(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

* * *